

§ 17.33

and the facts alleged, and shall be filed with the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, delivered to the presiding officer, and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The presiding officer may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the presiding officer, any party may file a response to such motion.

(d) The presiding officer may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

§ 17.33 The hearing and burden of proof.

(a) The presiding officer shall conduct a hearing on the record to determine whether the respondent is liable for a civil money penalty and, if so, the appropriate amount of any such civil money penalty considering any aggravating or mitigating factors.

(b) In order to prevail, the Center must prove respondent's liability and the appropriateness of the penalty under the applicable statute by a preponderance of the evidence.

(c) The respondent must prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the presiding officer, who may order closure only to protect trade secrets or confidential commercial information, as defined in § 20.61 of this chapter, information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, or other information that would be withheld from public disclosure under part 20 of this chapter.

21 CFR Ch. I (4-1-11 Edition)

§ 17.34 Determining the amount of penalties and assessments.

(a) When determining an appropriate amount of civil money penalties and assessments, the presiding officer and the Commissioner of Food and Drugs or entity designated by the Commissioner to decide the appeal (currently the DAB) shall evaluate any circumstances that mitigate or aggravate the violation and shall articulate in their opinions the reasons that support the penalties and assessments imposed.

(b) The presiding officer and the entity deciding the appeal shall refer to the factors identified in the statute under which the penalty is assessed for purposes of determining the amount of penalty.

(c) Nothing in this section shall be construed to limit the presiding officer or the entity deciding the appeal from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 17.35 Sanctions.

(a) The presiding officer may sanction a person, including any party or counsel for:

(1) Failing to comply with an order, subpoena, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including, but not limited to, those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with a discovery order, including discovery and subpoena provisions of this part, the presiding officer may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and